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PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1006

AARON BAILEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Counsellor of record for the Petitioner, Aaron Bailey, prays that a Writ of Certiorari issue to review the judgment from the United States Court of Appeals for the Third Circuit entered in the aoove case on November 12, 1965.

OPINIONS BELOW

The Opinion of the District Court for the Northern District of Alabama (R. 21) is unreported to the best of Petitioner's knowledge but copies thereof are appended to this Petition in the Appendix at page A1.

The Opinion of the Court of Appeals for the Fifth Circuit (R. 24) is unreported at this time to the best of Petitioner's knowledge but copies thereof are appended to this Petition in the Appendix at page A2.

JURISDICTION

The judgments of the Court of Appeals for the Fifth Circuit were made and entered on November 12, 1965 (R. 26), and copies thereof are appended to this Petition in the Appendix at page A4. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether, in a Contract between the United States of America in the nature of a Lease Agreement containing the following clause, to-wit (R. 14):

> "That the United States or its contractors or any of their officers, agents, or employees shall not be responsible, except as otherwise provided in Condition No. 5 hereof, for any loss, expense, damages to property, or injury to persons, which may arise from, or be incident to the use and occupation of the said premises, or for damages to the property of the Lessee, or for injury to the person of the Lessee, or for damages to the property or injury to the person of the Lessee's officers, agents, servants, or employees, or others who may be on said premises at their invitation, or the invitation of any one of them, arising from activities of the United States or its contractors, and the Lessee shall hold the United States and its contractors, and any of their officers, agents, or employees, harmless from any and all such claims",

includes the negligence of the United States of America and thus precludes the party contracting with the United States

or the Lessee from maintaining an action against the United States of America for injuries that the Lessee may have suffered as a result of the negligence of the United States of America.

STATUTE

The only statute involved in this case is the Federal Tort Claims Act (28 U.S.C. 1346(b), 1402(b), and 2671-2680).

STATEMENT

This case originated in the United States District Court for the Northern District of Alabama, Northeastern Division (R. 8), wherein on June 1, 1964, the Appellant filed suit in said Court against the Respondent, United States of America, alleging that on to-wit: March 27, 1961, that he, Petitioner, entered into a five year Lease Agreement, beginning on July 1, 1961, and ending on June 30, 1966, for agricultural and grazing purposes on Redstone Arsenal Military Reservation lying within the boundaries of Madison County, State of Alabama. That the Petitioner moved his cattle onto the leased premises sometime around July 1, 1961, for the purpose of grazing them (R. 9); that sometime prior to July 21, 1962, and subsequent to July 1, 1961, without the knowledge or consent of the Petitioner, the Respondent, by and through its agents, servants or employees did negligently cut a drainage ditch on a part of said Reservation which was not leased to the Petitioner and on a part of the said Reservation which was the subject of the Lease between the Petitioner and the Respondent; that the Petitioner made verbal objection to the Redstone Arsenal Post Engineers, Land Management Division, about

the drainage ditch, and the Petitioner was assured by personnel in said Land Management Division that the water which was being drained upon the leased premises was harmless, pure and fit for the Petitioner's cattle to consume; further, that the Respondent did negligently allow poison or poisonous water to get into the said drainage ditch and the water therein, and that as a proximate consequence and result thereof, Petitioner's cattle consumed said poison or poisonous water without the Petitioner's knowledge and as a proximate consequence and result thereof, twenty (20) head of Petitioner's prime beef cattle and eight (8) young calves belonging to Petitioner died and some other sixty (60) head of Petitioner's cattle became seriously ill as the result of their consuming said poison or poisonous water; that as a proximate result and consequence thereof, Petitioner suffered damages in the amount of $29,000.00 (R. 10, 11).

On the 30th day of July, 1964, the Respondent filed an Answer in the cause, pleading the general issue and also pleading the contributory negligence of the Petitioner (R. 17). On the 28th day of October, 1964, the Respondent filed a Motion for Summary Judgment (R. 21). On November 6, 1964, Respondent's Motion for Summary Judgment was heard before the Honorable H. H. Grooms, United States District Judge, and an Order was entered on said date granting the Respondent's Motion for Summary Judgment (R. 21, 22). Said Motion was granted upon basis of the pleadings in the cause, including the Lease and the Indemnity Agreement contained in said Lease (R. 21).

On appeal, the Court of Appeals for the Fifth Circuit affirmed, citing the case of *United States* v. *Starks*, 7th Cir., 1957, 239 F.2d 544 (R. 24, 25). Judgment was entered to that effect on November 12, 1965 (R. 26).

REASON FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets Condition No. 10, the same harmless or indemnity clause, as contained in the Lease Agreement between the United States of America and Aaron Bailey.

This cause presents a very important question of public interest which needs to be determined by this Honorable Court, due to the fact that there are countless numbers of contracts currently in existence between the United States of America and individuals, firms, corporations and other legal entities throughout the United States containing the identical clause as per this Lease Agreement and clauses, very similar in wording, in contracts of various subjects.

The holdings thus far in this case have been in conflict with *Dixilyn Drilling Corporation* v. *Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

CLOUD, BERRY & ABLES
315 Franklin St., S.E.
Huntsville, Alabama

By Earl E. Cloud
EARL E. CLOUD
Member of Firm
Counsellor for Petitioner

The District Court's Order granting the Motion of the United States of America for Summary Judgment was filed on November 6, 1964, and read as follows:

> "This matter came on for hearing at this time upon the Defendant's Motion for Summary Judgment. After considering all the pleadings in the cause, including the Lease and the Indemnity Agreement, and upon consideration of the law applicable thereto, the Court is of the opinion that the said Motion for Summary Judgment is due to be granted.
>
> It is, therefore, ordered, adjudged and decreed that the Defendant's Motion for Summary Judgment be, and the same is hereby, granted, and this action be, and the same is hereby, dismissed at the cost of the Plaintiff, for which execution may issue in the time and manner provided by law.
>
> Done and Ordered, this the 6th day of November, 1964.
>
> s/ H. H. Grooms
> United States Judge." (R. 21, 22)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22219

AARON BAILEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(November 12, 1965.)

Before MARIS,* RIVES and BELL, Circuit Judges.

PER CURIAM: This appeal is from the grant of a motion for summary judgment. Appellant, a lessee of grazing lands from the United States, brought suit under the Federal Tort Claims Act for damages to cattle allegedly caused by the negligence of the United States. The motion was based on an exculpatory and hold harm-

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*Of the Third Circuit, sitting by designation.

less clause in the lease.[1] It was controlling in the circumstances and the District Court properly terminated the litigation by granting the motion. *United States* v. *Starks*, 7 Cir., 1957, 239 F.2d 544.

The motion to tax appellee with printing costs is denied.

AFFIRMED.

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1. Clause 10:

"That the United States or its contractors or any of their officers, agents, or employees shall not be responsible, except as otherwise provided in Condition No. 5 hereof, for any loss, expense, damages to property, or injuries to persons, which may arise from or be incident to the use and occupation of the said premises, or for damages to the property of the lessee, or for injuries to the person of the lessee's officers, agents, servants, or employees, or others who may be on said premises at their invitation or the invitation of any one of them, arising from activities of the United States or its contractors, and the lessee shall hold the United States and its contractors, and any of their officers, agents, or employees, harmless from any and all such claims."

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22219

D. C. Docket No. 64-308-Civil Action

AARON BAILEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

Before MARIS,* RIVES and BELL, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed; and the motion to tax appellee with printing costs is denied.

November 12, 1965

Issued as Mandate: Dec. 6, 1965

*Of the Third Circuit, sitting by designation.

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No. 1006

In the Supreme Court of the United States

OCTOBER TERM, 1965

AARON BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1006

AARON BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is an action under the Federal Tort Claims Act to recover $29,000 in damages. Petitioner grazed his cattle within the Redstone Arsenal Military Reservation on land which he had leased from the government. He alleged that the government negligently allowed "poison or poisonous water" to flow into a drainage ditch constructed on a portion of the grazing land. Some of his cattle died or became ill, petitioner claimed, as a result of drinking water from the ditch (R. 9, 10–11).[1] The district court granted summary judgment for the government because the

[1] "R" refers to the mimeographed record in the court of appeals.

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exculpatory-and-hold-harmless clause in the lease precluded petitioner's recovery (Pet. App. A1).[2] The court of appeals affirmed *per curiam* (Pet. App. A3), relying on *United States* v. *Starks,* 239 F. 2d 544 (C.A. 7), which reached the same conclusion on almost identical facts.

Petitioner seeks further review on the ground that the decision of the court of appeals misinterpreted the lease provision and is in conflict with *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.,* 372 U.S. 697. The plain language of the lease encompasses the present situation, and there is no occasion to examine the uniform determinations of the two courts below and the Seventh Circuit. *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co., supra,* is one of a series of cases which hold void as against public policy contract clauses exculpating towboats from negligence. See, also, *Bisso* v. *Inland Waterways Corp.,* 349 U.S. 85, and *Boston Metals Co.* v. *Winding Gulf,* 349 U.S. 122. Those decisions rest

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[2] The clause provides (R. 14):

> *That the United States* or its contractors or any of their officers, agents, or employees *shall not be responsible*, except as otherwise provided in Condition No. 5 hereof, for any loss, expense, damages to property, or injuries to persons, which may arise from or be incident to the use and occupation of the said premises, or *for damages to the property of the lessee*, or for injuries to the person of the lessee's officers, agents, servants, or employees, or others who may be on said premises at their invitation or the invitation of any one of them, *arising from activities of the United States or its contractors, and the lessee shall hold the United States and its contractors, harmless from any and all such claims.* [Emphasis supplied.]

on the special bargaining position of common carriers and prevent overreaching through "monopolistic compulsions." *Bisso* v. *Inland Waterways Corp., supra,* at 91. That theory does not apply here since the government had no unusual bargaining power; it was merely in the same position as any other lessor of land. Petitioner, moreover, knew that the land was situated within the bounds of a military arsenal. He was aware, or should have been aware, of the conditions existing on the premises, the possibility of injury to his property, and the exculpatory provision in the lease.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966